

**TO: Hon. Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice
and Procedure**

**FROM: Hon. D. Lowell Jensen, Chair
Advisory Committee on Federal Rules of Criminal
Procedure**

**SUBJECT: Report on Proposed and Pending Rules of Criminal
Procedure**

DATE: May 7, 1996

I. INTRODUCTION.

At its meeting April 29, 1996, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to Rules of Criminal Procedure 5.1, 16,* 26.2, 31, 33, 35, and 43.

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II. ACTION ITEMS

A. Rule 5.1. Preliminary Examination & Rule 26.2. Production of Witness Statements.

The proposed amendments to Rule 5.1 and Rule 26.2 would require production of a witness' statement after the witness has testified at a preliminary hearing. The amendments parallel similar changes made in 1993 to Rules 32, 32.1, 46, and Rule 8 of the Rules Governing Proceedings Under § 2255. The proposed amendments are attached.

**Recommendation: The Advisory Committee recommends that the
amendments to Rules 5.1 and 26.2 be published for public comment.**

* The proposed amendments to Criminal Rule 16 have been sent to the Judicial Conference with the recommendation that they be approved by the Conference and transmitted to the Supreme Court with the recommendation that they be adopted by the Court and transmitted to Congress.

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C. Rule 31. Polling of Jurors.

The Advisory Committee has proposed an amendment to Rule 31, which would require that the jurors be polled individually whenever any polling occurs after the verdict, either at a party's request or on motion of the court. The Committee agreed with the view that there are distinct advantages to individual polling and that the practice should be required. Individual polling, for example, should reduce the likelihood of a post-trial attack on the verdict on the ground that one of the jurors disagreed with the verdict. The amendment leaves to the courts the exact method of conducting the individual polling vis a vis multiple defendants, etc.

Recommendation: The Advisory Committee recommends that the proposed amendment to Rule 31 be published for public comment.

D. Rule 33. Motion for New Trial.

The proposed amendment to Rule 33 is intended to provide some consistency to the amount of time for filing a motion for new trial based upon newly discovered evidence. As written, the defendant has two years from the "final judgment" to file such a motion. Because the courts interpret final judgment to mean the decision of the appellate court, the disparity in the actual amount of time available to file a motion for new trial can be great. The amendment shifts the triggering event from appellate action to the trial court's verdict or finding of guilty. That is currently the triggering event for motions for new trial based on grounds other than newly discovered evidence. Because the amendment does not change the current two year limit, in effect it shortens the actual time for filing the motion. The Committee considered, but rejected, a proposed change which would have extended the time to three years. The consensus of the Committee was that two years from the verdict or finding of guilty was sufficient time to file the motion.

Recommendation: The Committee recommends that the amendment to Rule 33 be published for public comment.

E. Rule 35(b). Reduction of Sentence for Substantial Assistance.

Rule 35(b) provides a mechanism for the government to seek a reduction in the defendant's sentence if the defendant provides "substantial assistance" after sentence is imposed. If the defendant has provided substantial assistance to the government before sentencing, the court may reduce the sentence in accordance with the Sentencing Guidelines, § 5K1.1. The proposed amendment to Rule 35(b) is an attempt to fill a gap which may exist where a defendant's pretrial and post-sentencing assistance, when treated separately, does not amount to substantial assistance, but is substantial when combined.

As reflected in the Committee Note, the amendment is not intended to provide “double dipping.” The Committee believed that in practice, the likelihood that double dipping might occur would be rare because the government decides whether to file a Rule 35(b) motion.

Recommendation: The Advisory Committee recommends that the amendment to Rule 35 be published for public comment.

F. Rule 43(c)(4). Presence of Defendant.

The amendment to Rule 43(c) is necessary to address specifically the issue of the defendant’s presence at a reduction of sentence hearing or a correction of sentence hearing conducted under § 3582(c). Amendments made to Rule 43 in 1995 addressed the question of in absentia sentencing of a defendant and the presence of a defendant at a “correction” of sentence proceeding. In light of those amendments and caselaw interpretation of Rule 35 (which addresses correction and reduction of sentences), it has become clear that a more comprehensive treatment of the issue is required. In addition, Rule 43 makes no mention of resentencing conducted under 18 U.S.C. § 3582(c) which may result from retroactive changes in the sentencing guidelines or from a motion by the Bureau of Prisons to reduce a sentence based on extraordinary and compelling reasons.

The proposed amendment provides that a defendant need not be present a correction or reduction of sentence under Rule 35(b) or (c) or at a resentencing conducted under 18 U.S.C. 3582(c). A defendant’s presence would be required at a resentencing following a remand, under Rule 35(a).

Recommendation: The Advisory Committee recommends that the proposed amendment to Rule 43(c)(4) be published for public comment.

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